LE COPY

APR 28 1959
JAMES R. BROWNING, Clerk

No. 807

In the

Supreme Court of the United States

OCTOBER TERM, 1959

BERNICE COUCH, *et vir.*, STERLING COUCH,
Petitioners,

v.

CITY OF RICHARDSON, GERTRUDE M. GILLESPIE,
Respondents.

Application for Writ of Certiorari to the Supreme Court of Texas

ANSWER OF THE RESPONDENT, GERTRUDE M. GILLESPIE

LEWIS B. LEFKOWITZ,
JOHN PLATH GREEN,
16th Floor, Kirby, Building,
Dallas 1, Texas.

WILLIAM H. SHOOK,
5922 Swiss Ave.,
Dallas 14, Texas,
Attorneys for Respondent Gertrude M. Gillespie.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711.

SUBJECT MATTER AND AUTHORITIES INDEX

	Page
Jurisdiction	1-2
Question Presented	2-3
Statement of the Case	3-4
Argument	4-7
Conclusion	7

Authorities

Panhandle Eastern Pipe Line Co. v. Calvert, 347 U. S. 157; 74 S. Ct. 396; 98 Law Ed. 583	5
Texas Rules of Civil Procedure, Rule 469, subdivision (c)	5, 6
Harris v. Windsor, 294 S. W. 2d 798	6
Edwards v. Strong, 147 Texas 155; 213 S. W. 2d 979	6
East Texas Motor Freight Lines v. Loftis, 148 Texas 242; 223 S. W. 2d 13	6
Moore v. Dilworth, 142 Texas 538	7
man v. California, 344 U. S. 357; 73 S. Ct. 293; Law Ed. 387, page 391	7

No.....

In the

Supreme Court of the United States

OCTOBER TERM, 1959

BERNICE COUCH, *et vir.*, STERLING COUCH,
Petitioners,

v.

CITY OF RICHARDSON, GERTRUDE M. GILLESPIE,
Respondents.

Application for Writ of Certiorari to the Supreme Court of Texas

ANSWER OF THE RESPONDENT, GERTRUDE M. GILLESPIE

Comes now Gertrude M. Gillespie, and for answer says the application of petitioners should be denied, and in support thereof respectfully shows to the Court the following:

JURISDICTION

The Supreme Court of the United States should deny the Application for Writ of Certiorari to the Supreme Court of Texas, among others, for the following reasons:

1. The Supreme Court of Texas, acting in accordance with Texas Law, Refused, N. R. E. the Application for

Writ of Error to that Court. This action on its part terminated its authority and jurisdiction over the judgment of the Court of Civil Appeals. The Court of Civil Appeals for the Fifth Judicial District has the actual possession and exclusive control over that record and its judgment insofar as the law of Texas is concerned. If available, Writ of Certiorari from the Supreme Court of the United States would lie to the Court of Civil Appeals, and not to the Supreme Court of Texas.

2. There is no proof in the record in this Court that Petitioners have or had a justiciable interest in the area claimed to be part of Dallas Street. There is no showing in the present Application that it was established in the Texas Courts that Petitioners had any such right. There was no Statement of Facts. But, even if Petitioners had rights if seasonably claimed, no claim was made or even attempted to be made for protection under Federal right until the Motion for Rehearing was filed in the Supreme Court of Texas. That Court, in the circumstances of the case, under the laws of Texas, then did not have jurisdiction to consider the point.

QUESTION PRESENTED

We affirm with confidence that the Application for Writ of Certiorari does not present to the Supreme Court of the United States the question propounded here by Petitioners. And we also confidently affirm, that if the question is to be answered, that the answer must be "no". There is no evidence in the record that any proof of any right was

made by Petitioners either in the trial court, or that any proof of any right was adduced before the Court of Civil Appeals or the Supreme Court, nor that any claim of such right was even attempted to be made seasonably, but that such attempt was first made in the Motion for Rehearing in the Supreme Court of Texas.

STATEMENT OF THE CASE

We have refrained, though with difficulty, from pointing out the many misstatements of Texas law and of the facts contained in the Application for Certiorari, but we do not do so, because all the facts material to the proper disposition of the Application appear from the record without dispute. Despite this, we feel that it is proper to say that the judgment is correct, and that the rulings of the Texas Courts were in accord with the laws of Texas.

There was no Statement of Facts in the case, and hence there was no proof before the Court of Civil Appeals, or the Supreme Court of Texas, that Petitioners had any rights which could have been violated. No attempt was made in the trial court or in the Court of Civil Appeals to claim that a Federal right had been or was being violated. No such claim was made in the Supreme Court of Texas in the Application for Writ of Error to that Court, as was required by the laws of Texas. The very first time any attempt was made to make such claim was in the Motion for Rehearing in the Supreme Court of Texas. This claim was not seasonably made, because under the laws of Texas the Supreme Court of Texas did not have juris-

diction to consider a Point of Error made for the first time in the Motion for Rehearing in that Court.

The Petition for Certiorari is not accompanied by a certified copy of the record.

ARGUMENT

Petitioners, in the first paragraph under this head, incorrectly assume that the Supreme Court of the United States has general "power of supervision" over the judgments of State Courts. On certiorari the power of the Supreme Court of the United States to review the judgment of the Courts of the States is limited both as to the types of cases, and manner. The limitation directly applicable here is that the Federal questions must be seasonably claimed. This contemplates that it must be done by pleading, and be supported by proof. There was no evidence of right, and no attempt to claim a Federal right until the Motion for Rehearing was filed in the Supreme Court of Texas. When the claim was made, the Supreme Court of Texas did not then have jurisdiction to consider the Point.

Under Texas law the Supreme Court has a limited jurisdiction in passing on applications for writ of error. It can only grant such writs upon points of error assigned in the motion for a rehearing in the Courts of Civil Appeals, and then assigned in the application for writ of error. There was no point or attempt to make any point of error in the Court of Civil Appeals in the Motion for Rehearing in that

Count, nor in the Application for Writ of Error to the Supreme Court. So, therefore, in addition to want of a seasonable claim of Federal right, the Supreme Court necessarily refused the application on Texas law, and could not and did not pass upon or violate any Federal right of Petitioners.

It then necessarily follows that the Supreme Court of the United States will not consider whether the questions of Texas law argued by Petitioners were decided correctly.

The Supreme Court of Texas refused to admit this case into that Court. This action was authorized under State Law. We believe that more than half of the applications for writ of error to that Court are disposed by the order "Refused, No Reversible Error."

In the circumstances, if available on the facts and record, Writ of Certiorari would lie to the Court of Civil Appeals and not to the Supreme Court. *Panhandle Eastern Pipe Line Co. v. Calvert, 347 U. S. 157; 74 S. Ct. 396, 98 Law Ed. 583.*

However, in the instant case, there being no Statement of Facts, and no evidence of any right in Petitioners in that Court, and there being no sort of attempt even to claim any Federal right in that Court, Writ of Certiorari did not and does not lie to that Court, either.

Rule 469, subdivision (c), Texas Rules of Civil Procedure, which controls and governs the jurisdiction of the

Supreme Court of Texas in passing on Applications for Writ of Error to that Court, reads as follows:

> "(e). Points of Error. The Points of Error relied upon, separately numbered, shall be stated in short form without argument and be germane to some assignment of error in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also have been assigned as error in the motion for rehearing in said Court."

The Supreme Court of Texas, in the case of *Harris v. Windsor, reported in 294 S. W. 2d 798*, not yet officially reported, said:

"The Point was not raised in the trial court, in petitioners' brief in the Court of Civil Appeals, or in his motion for rehearing in that court. It is presented for the first time in this court, and cannot, therefore, be considered. *Rule 469 (c) Texas Rules of Civil Procedure; Edwards v. Strong, 147 Texas 155; 213 S. W. 2d 979; East Texas Motor Freight Lines v. Loftis, 148 Texas 242; 223 S. W. 2d 13.*" It should be noted that the Point 2 in *Harris v. Windsor* was raised in the petition for Writ of Error to that Court.

In *East Texas Freight Lines v. Lofttis, 148 Texas, 242, 247*, cited in the case just quoted, the Point was raised in the Petition for Writ of Error, and the Supreme Court overlooked the fact that it had not been raised in the

Motion for Rehearing in the Court of Civil Appeals, and this fact being called to their attention, the Supreme Court, after it had inadvertently granted the Writ, held that it was without jurisdiction to consider said Point. *Moore v. Dilworth, 142 Texas 538, on Rehearing.*

In the case of *Edelman v. California, 344 U. S. 357; 73 S. Ct. 293; 97 Law Ed. 387*, from which we quote, page 391, and where the Federal question was not raised until it was done on the appeal to the Supreme Court of the United States, and that Court said:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the Federal Questions are not seasonably raised in accordance with state law."

CONCLUSION

Respondent, Gertrude M. Gillespie, respectfully prays the Court to deny the Application for Writ of Certiorari.

Respectfully submitted,

LEWIS B. LEFKOWITZ,
Kirby Bldg., Dallas 1, Texas

JOHN PLATH GREEN,
Kirby Bldg., Dallas 1, Texas

WILLIAM H. SHOOK,
5922 Swiss Ave.,
Dallas 14, Texas,
Attorneys for Respondent Gertrude M. Gillespie.